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90-1340

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

SUPREME COURT CASE NO.

ELEANOR S. SIMPSON,
Petitioner

v.

DONALD M. SIMPSON, TERRY C. YOUNG,
GILES, HEDRICK & ROBINSON, P.A.;
TANYA PLAUT, LAWSON LAMAR, SHERIFF
OF ORANGE COUNTY, FLORIDA; AND
MINNIE BRIDGES
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEAL

VOLUME 2

JAMES R. LAVIGNE, ESQUIRE
5401 S. Kirkman Road, Suite 750
Orlando, Florida 32819
(407) 363-4821
(407) 363-5167 (FAX)
Attorney for Petitioner

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

CASE NO. 85-455-CIV-ORL

ELEANOR S. SIMPSON

Plaintiff

vs.

DONALD M. SIMPSON, TERRY C. YOUNG, GILES, HEDRICK & ROBINSON, P.A., et al.

Defendants

_____/

ORDER

This matter is before the Court sua sponte. On June 27, 1985 this Court entered summary orders granting five motions to dismiss (docs. 10, 11, 12, 16, 18). On that same date, the Clerk of Courts closed the file assuming that such orders constituted a dismissal of the action filed. Thereafter, on July 17, 1985 the plaintiff filed a Notice of Appeal.

The Court's orders of June 27, 1985 did not specify that amendment of the complaint was precluded or that granting the motions constituted dismissal of the action. Although the plaintiff does not have a right to amend as a matter of course after dismissal of the complaint, Czeremcha v. International Association of Machinists and Aerospace Workers, AFL-CIO, 724, F.2d 1552, 1554 (11th Cir. 1984), the liberal mandate of Federal Rule of Civil Procedure 15 requires that leave to amend be "freely given when justice so requires." Fed. R. Civ. P. 15(a), cf Fed. R. Civ. P. 41(a)(2).

In accordance with Federal Rule of Procedure 60(a), the Clerk of the Courts is directed to reopen the case file. Plaintiff has twenty days within which to amend her complaint.

SO ORDERED at Orlando, Florida this 29 day of July, 1985.

/S/ G. KENDALL SHARP
United States District Judge

Copies to:

James R. Lavigne, Esq.
Jeffrey G. Slater, Esq.
Duncan B. Dowling, III, Esq.
William G. Osborne, Esq.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 85-455-CIV-ORL

ELEANOR SIMPSON,

Plaintiff,

vs.

DONALD M. SIMPSON, TERRY C. YOUNG, GILES, HEDRICK & ROBINSON, P.A., TANYA PLAUT, ROYCE PIPKINS and LAWSON LAMAR, Sheriff, Orange County, Florida,

Defendants.

ORDER

This is an action by an individual against a number of defendants for alleged wrongs arising out of plaintiff's divorce from her husband of over forty-two years. The wrongs alleged seem to fall into two categories. First, plaintiff alleges that during October of 1983 deputy sheriffs forcibly entered her home pusuant to a court order for the

purpose of carrying out a prior order dividing personal property of the husband and wife, and thereafter, without probable cause, arrested plaintiff for resisting arrest. The second alleged wrong relates to the judicial sale of plaintiff's interest inher home of twenty-two years resulting from a judgment obtained by a former attorney in the divorce on a claim for attorney's fees against plaintiff. Before the Court presently are five separate motions to dismiss the first amended complaint. Most of the motions raise common issues and, therefore, rather than discussing each motion separately, the Court will address the issues.

A. WHETHER THE FIRST COUNT IN THE COMPLAINT STATES A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983

The standard in granting a motion to dismiss for failure to state a claim is

well known. "[A] motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of vacts which could be proved in support of his claim." Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506 (5th Cir. 1971); see also Quality Foods de Central America, S.A. v. Latin American Agribusiness Development Corporation, 711 F.2d 989, 998 (11th Cir. 1983). This standard will be applied to the allegations in the first count as summarized here.

The allegations indicate that plaintiff Eleanor Simpson was involved in a state court divorce proceeding against her husband, defendant Donald Simpson. She was represented by defendant Tanya Plaut. During the pendency of the divorce proceeding, defendant Plaut filed

a motion to withdraw from representing the plaintiff to which plaintiff objected. The Court granted defendant Plaut's motion to withdraw.

The final judgment in the divorce included a provision that the parties shall each be awarded an equal interest in the marital home. The final judgment was dated may 24, 1983. Before that, on April 29, 1983, defendant Plaut sued plaintiff in state court for attorney's fees. Defendant Plaut was awarded judgment in the amount of $8,013.87 on January 19, 1984. On March 26, 1984, defendant Plaut caused a notice of sheriff's levy to be filed upon plaintiff's interest in the marital home, and the sheriff issued a notice of sheriff's sale advertising the sale of the property for April 30, 1984, "between the legal house of eleven o'clock in the

forenoon and two o'clock in the afternoon on said day."

The sale took place at 11:00 a.m. and the plaintiff's property was sold to the defendant husband Donald Simpson for the sum of $8,410.00. The plaintiff's interest in the house was worth over $75,000.00. The plaintiff appeared at the courthouse prior to 12:00 noon and offered to redeem her interest by tendering the amount for which the property was sold. The plaintiff was not allowed to redeem her interest.

During the pendency of the divorce proceeding, and also after the entry of judgment in the divorce, plaintiff had made public accusations against the trial judge, William C. Gridley, that the judge was biased against her and that he was not conducting a fair proceeding. she filed written complaints and participated

in circulating public petitions calling for the investigation of Judge Gridley.

Based on these facts, plaintiff alleges that her husband (defendant Simpson), her former attorney (defendant Plaut), the sheriff (defendant Lamar), and Defendants Terry C. Young, and the law firm of Giles, Hedrick & Robinson, P.A. (whose connection with the events described is not explained at all in the first count, although it is later alleged that they are the husband's attorneys), conspired to deprive plaintiff of her constitutional rights. The specific deprivations are not clearly pled, but it can be inferred that the deprivations alleged are (1) that the defendants conspired, along with the trial judge in the divorce proceeding and other circuit judges, to intentionally deprive plaintiff of her interest in her home for

the purpose of punishing plaintiff for having complained of perceived unfair treatment by the trail judge in the divorce proceeding, (2) that the plaintiff was denied her right to equal protection in that the law in effect at the time of the sale prohibited the sale of homestead property belonging to married or single persons who were the head of the household with two or more persons, but did not extend similar protection to single women without a household of two or more persons, and (3) plaintiff was denied a "United States constitutionally required opportunity to redeem her property prior to issuance of a deed by the sheriff."

In assessing the viability of this claim, "the initial inquiry must focus on whether the two essential elements to a Section 1983 action are present: (1)

whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived that person of rights, privileges, or immunities secured by the constitution or laws of the United States." Paarratt v. Taylor, 451 U.S. 527, 534 (1981).

1. Whether the Allegations that Defendants Acted Under Color of State Law are Sufficient

With regard to the first question, the defendants fall into two categories. Defendant Lamar is a county sheriff and his actions are unquestionable taken under color of state law. The reamining defendants in the first count, Simpson, Plaut, Young and Giles, hedrick & Robinson, P.A., are private persons, whose actions normally would not constitute state action, or held to be taken under color of state law. However,

plaintiff has alleged that the defendants "did conspire and operate together with the Circuit Court Judges under color of Florida law to defeat the plaintiff of her homestead property by conspiring, aiding and abetting each other in an effort to deprive her of her homestead property without due process of law...." Complaint, paragraph 12.

It is not well established that a private person who conspires with a judge is a state actor for purposes of section 1983. Dennis v. Sparks, 449, U.S. 24 (1980). As stated by the Eleventh Circuit "[t]he 'color of state law' component of Section 1983 may be satisfied by showing that an official act of a defendant judge was the product of a corrupt conspiracy involving the judge and other private parties." Dykes v. housman, 743 F.2d 1488 (11th Cir. 1984)

rehearing en banc granted 743 F.2d 1505 (11th Cir. 1984). "Even if the judge himself is held to be absolutely immune from suit ... the private parties who conspire with the judge act under color of state law for Section 1983 purposes." Id.

The question then is whether plaintiff has made allegations sufficient to bring herself within the holdings of Dennis v. Sparks and Dykes v. Houseman. Guidance in answering that question is provided by Phyllips v. Mashburn, 746 F.2d 782 (11th Cir. 1984), which affirmed the dismissal of a pro se prisoner's conplaint alleging a conspiracy, between a state court judge adn the attorneys who represented him during his criminal prosecution, to deprive him of his right to sue the attorneys for legal malpractice. The complaint made no particularized showing

that a comspiracy existed between the defendant lawyers and the judge. Therefore, the complaint was not sufficient. "The naked assertion of a conspiracy between a state judge and private defendants without supporting operative facts provides an insufficient state action nexus for a section 1983 action." Id. at 785. Accord Fullman v. Graddick, 738 F.2d 553 (11th cir. 1984).

The Phillips court relied on Sooner Products Co. v. McBride, 708 F.2d 510 (10th Cir. 1983), a case in which the Court of Appeals affirmed the dismissal of a claim similar to the one in the instant case. The Tenth Circuit stated:

> When a plaintiff in a Section 1983 action attempts to assert the necessary "state action" by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action ... The standard is

> even stricter where the state officials allegedly involved in the conspiracy are immune from suit, as are the state court judges here.

Id. at 512.

In the present case, the amended complaint is absolutely devoid of facts tending to show agreement and concerted action with the judges named in the complaint. There are no operative facts - merely a naked assertion that a conspiracy existed. Moreover, there are no facts pled which could lead to an interference that the private defendants were in a conspiracy with the sheriff or the judges. Thus, Count I as to the private defendants Donald M. Simpson, Terry C. Young, giles, Hedrick & Robinson, P.A., and Tanya Plaut will be dismissed. Plaintiff will be granted leave to amend in order to give her the opportunity to meet the pleading requirements set forth above.

2. Whether the Allegations that Defendant Lamar's Conduct Deprived Plaintiff of Rights, Privileges, or Immunities Secured by the Constitution or Laws of the United States are Sufficient

Plaintiff alleges that she was treated unfairly with regard to the disposition of her home and that this unfair treatment was motivated by a desire to punish or retaliate aginst her for speaking out to complain about the proceedings in her divorce. This allegation must be evaluated under the liberal federal pleading standare taht requires denial of the motion to dismiss unless it appears to a certainty that the plaintiff would not be entitled to recover when any set of facts which could be proven in support of her claim. Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506 (5th Cir. 1971).

In Wilson v. Thompson, 592 F.2d 1375 (5th cir. 1979), the Court of Appeals

recognized that state action taken in retaliation against an individual's exercise of constitutionally protected rights gives rise to a cause of action under 42 U.S.C. Section 1983. See also Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977); of. Barnett v. Housing Authority of City of Atlanta, 707 F.2d 1571, 1577 (11th Cir. 1983) (Deprivation of property interest for improper motive is violation of substantive due process.) Thus, in the present case, if the plaintiff can prove that in fact she was treated unfairly and that the unfair treatment was taken as punishment for the exercise of her right to complain about the performance of the judge in her divorce, she will have made out a prima facie case of a violation of her constitutional rights. Thus, as to this allegation, defendant Lamar's motion

will be denied.

In addition, Plaintiff's first claim states, in paragraph 13, that plaintiff was discriminated against in that "the law in effect at the time of the forced sale of the plaintiff's homestead, disallowed the forced sale of homestead of married or single persons who were the head of household with 2 or more persons but not for single women who were heads of their own households...." In the prayer for relief, plaintiff asks for a declaratory judgment that Florida Constitution, Article X., Section 4, as applied prior to November 6, 1984, applies equally to all natural persons. Evidently then plaintiff is attacking the constitutionality of Article X, Section 4 of the Florida Constitution, which provides for a homestead exemption from forced sale for debts.

The constitutional provision, before its amendment in November of 1984, applied only to property "owned by the head of a family." After its amendment, it applies to property "owned by a natural person." Plaintiff seems to be alleging that the former grant, only to heads of families, was unconstitutinally discriminatory. If the provisions discriminated on the basis of gender onits fact plaintiff would, of course, have stated a claim. E.g. Califano v. Goldfarb, 430 U.S. 199 (1977). The provision does not so discriminate, and to the extent that plaintiff has attempted to state an independent claim for denial of equal protection she has failed to do so. Should plaintiff attempt to assert such a claim in another amended complaint, it is suggested that the claim be stated in a separate count,

Rule 10(b), Fed.R.Civ.P., and that the nautre of the equal protection violation be alleged clearly.

Finally, with regard to Count I, plaintiff alleges in paragraph 13 a denial of her "constitutionally required opportunity to redeem her property prior to the issuance of a deed by the sheriff." This allegation does not state an independent basis for relief. Plaintiff has not cited, nor had the Court located, any authroity in support of such a claim. In order to eliminate from the present amended complaint, the claims of equal protection and denial of right to redeem, the Court will order that paragraph 13 of the complaint be stricken.

B. WHETHER THE SHERIFF IS PROTECTED FROM LIABILITY UNDER MONELL V. DEPARTMENT OF SOCIAL SERVICES, 436 u.s. 658 (1978)

In Monell the Supreme Court held that municipalities were "person" within the meaning of section 1983 and thus were not immune from suit under that section. The Court also held however that a local government cannot be held liable under section 1983 on a respondeat superior theory. 436 U.S. at 691-695.

In the present case, as far as can be gleaned, plaintiff has sued defendant Sheriff Lamar as an individual, rather than in his official capacity. A suit against the sheriff in his official capacity would be tantamount to a suit against the county, and Monell would therefore apply. However, that is not the situation here, and Monell does not apply.

Nonetheless, it is true that recovery against the sheriff, even sued as an individual, cannot be had on the basis of

vicarious liablity for the unlawful actions of his deputies. Baskin v. Parker, 602 F.2d 1205 (5th cir. 1979). In the present case the plaintiff is not seeking relief on the basis of vicarious liablilty or respondeat superior. He has alleged a personal involvement by the sheriff. If plaintiff can prove a deprivation of constitutional rights and a personal involvement by the sheriff causing those constitutional violations, she can make out a prima facie case against the sheriff. Wagner v. Bonner, 621 F.2d 675 (5th cir. 1980).

C. WHETHER THE SHERIFF IS UNSULATED FROM LIABILITY BY OPERATION OF A STATE STATUTE

The sheriff, in his motion to dismiss, argues that he "is insulated from liability for having handled the forced sale of plaintiff's marital home under Section 30.30 Fla. Stat." That statute provides in part that "[n]o sheriff shall

be liable in damages to anyone whomsoever for making a wrongful levy whenevey the same has been made as required under subsection (1)."

By virtue of the Supremacy Clause of Article VI of the Constitution, the statutory immunity must give way to congressional intent to provide a remedy for violation of the constitution and laws of the United states. Questions of immunity under section 1983 are federal questions that are answered with reference to the intent of Congress. See e.g. Dennis v. Sparks, 449 U.S. 24 (1980). Obviously, it was not the intent of Congress in passing the reconstruction era civil rights acts to allow states to immunize their officers from suit in federal court for alleged violations of constitutional rights.

D. WHETHER THE COURT HAS PENDANT JURISDICTION OVER THE STATE LAW CLAIMS

Plaintiff has pled six state law claims against various of the defendants for which she requests the court to take pendant jurisdiction. The doctrine of pendant jurisdiction holds that federal courts have the power to hear a state claim along with a substantial federal claim if the relationship between the federal claim and the state claim permits the conclusion that th eentire action constitutes but one constitutional case. United Mine Workers v. Gibbs, 353 U.S. 715 (1966). "The state and federal claims must derive from a common nucleus of operative fact." Id. at 725. Even where pendant jurisdiction exists, a court may still exercise its discretion against hearing the state claim. Id.

In the present case, the fourth, the fifth, the sixth and seventh counts are related to occurrences separate from the

one upon which the first count, the only federal claim, is based. Thus, those state claims do not derive from a common nucleus of operative fact as the federal claim and pendant jurisdiction does not exist. Moreover, regarding the fifth claim, against defendant Pipkins, relief is requested against a party not named in the federal claim. See Aldinger v. Howard, 427 U.S. 1 (1976); Williams v. Bennett, 689 F.2d 1370, 1379 (11th Cir. 1982) cert.denied 104 S. Ct. 335 (1983). Accordingly, the fourth through seventh counts will be dismissed. the dismissals (except against defendant Pipkins) will be with leave to amend because some of the claims make reference to federally protected rights and there may be some possibility of pleading one or more federal claims. The claim against defendant Pipkins is identical to the

claim in the original complaint which was once dismissed. Therefore, for that claim, the dismissal will be without leave to amend.

The second claim in the amended complaint is against plaintiff's former husband, defendant Simpson. the claim does derive from the same occurrence as the federal claim, the forced sale of plaintiff's interest in her home. However, since the first claim was dismissed against defendant Simpson the second claim will be dismissed as well, with leave to amend. Now the Court exercises its discretion to hear the second count as a pendant matter will depend upon plaintiff's ability, if she chooses to amend, to state a viable federal claim against defendant Simpson.

The third count is similar. It relates to the civil action that resulted

in the sale of plaintiff's home. The Court's willingness to hear this claim under the doctrine of pendant jurisdiction will depend on whether or not the first count, the civil rights conspiracy claim, can be repled to state a claim.

E. WHETHER THIS ACTION IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

In the circuit court civil action that resulted in the sale of plaintiff's home, Plaut v. Simpson, No. CI 83-4444, plaintiff filed a motion to vacate sheriff's sale that was decided against her. The claimed deficiencies with regard to the sale that are raised in the present case arguable were, or at least could have been, raised in that motion. In addition, that portion of plaintiff's case that claims that defendant Plaut had no right to pursue the fee claim in the first place could have been raised by way

of defense or counterclaim prior to the judgment. Thus, a question arises as to whether plaintiff should be estopped from bringing some of the present claims.

Florida requires mutuality of parties as a prerequisite to asserting the doctrine of collateral estoppel. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984). Thus, only defendant Plaut, as the sole defendant who was a party to the state court proceeding, can raise the defense of estoppel.

If it not necessary to determine at this time whether plaintiff is estopped on some or all of her claims under the Florida criteria for applying collateral estoppel , see Mobil Oil Corporation v. Shevin, 354 So.2d 372 (Fla. 1977), because the claims against defendant

Plaut are being otherwise dismissed. If plaintiff chooses to amend and is successful in stating a claim against defendant Plaut the collateral estoppel and compulsory counterclaim issues may have to be addressed at that time.

F. CONCLUSION

The Court has considered the following motions: (1) defendant Lawson Lamar's motion to dismiss first amended complaint, 2) defendant Plaut's motion to dismiss, 3) defendant Pipkin's motion to dismiss first amended complaint, 4) defendant Donald M. Simpson's motion to dismiss first amended complaint, and 5) motion to dismiss filed by defendants Young and Giles, Hedrick & Robinson, P.A. (document no. 37).

It is noted that document no. 36 (another motion to dismiss on behalf of defendants Young and Giles, Hedrick &

Robinson, P.A.) has been withdrawn through the filing of the document entitled Response to Motion to Strike and Memorandum in Support thereof (document no. 46). Thus, plaintiff's motion to strike filed on September 17, 1985, (document no. 41) is moot.

Upon consideration of the motions, it is

ORDERED that

1. Defendant Lawson Lamar's motion to dismiss first amended complaint is GRANTED IN PART and DENIED IN PART. The motion is DENIED as to the first count except for paragraph 13. The motion is GRANTED as to the fourth count, the only other claim against defendant Lamar.

2. Paragraph 13 of the amended complaint is hereby STRICKEN.

3. The fourth count of the amended complaint against defendant Lamar is

DISMISSED and plaintiff is GRANTED leave to amend within twenty (2) days from the date of this order.

4. Defendant Pipkins' motion to dismiss first amended complaint is GRANTED.

5. The amended complaint against defendant Pipkins is hereby DISMISSED WITHOUT LEAVE TO AMEND.

6. The motions to dismiss of defendant Plaut, defendant Simpson, and defendants Young and Giles, Hedrick & Robinson, P.A. are GRANTED.

7. The amended complaint against defendant Plaut, defendant Simpson and defendants Young and Giles, Hedrick & Robinson, P.A., is hereby DISMISSED and plaintiff is GRANTED LEAVE TO AMEND within twenty (20) days from the date of this Order.

8. Plaintiff's motion to strike is MOOT.

SO ORDERED in Chambers at Orlando, Florida this 25 day of October, 1985.

/S/ G. KENDALL SHARP
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORALANDO DIVISION

CASE NO. 85-455-CIV-ORL-19

ELEANOR S. SIMPSON,

Plaintiff,

v.

DONALD M. SIMPSON, TERRY C. YOUNG, GILES, HEDRICK & ROBINSON, P.A., MINNIE BRIDGES, and LAWSON LAMAR, as Sheriff Orange County, Florida,

Defendants.

_____/

ORDER

This matter was considered by the Court on the following motions:

1. Motion to Dismiss Third Amended Complaint by Defendants Terry Young and Giles, Hedrick and Robinson, P.A., or in the Alternative, Motion to Strike Portions Thereof with Supporting Memorandum of Law (Doc. Nos. 110 and 111, filed December 5, 1986) and Memorandum in

Opposition (Doc. No. 117, filed December 18, 1986), Renewed Motion to Dismiss Third Amended Complaint or in the Alternative, Motion to Strike Portions Thereof by Defendants Terry C. Young and Giles, Hedrick and Roboinson (Doc. No. 142, filed March 14, 1988), Response of Plaintiff with Memorandum of Law (Doc. Nos. 145 and 146, filed May 2, 1988), Motion for Summary Judgment by Defendants Terry C. Young and Giles, Hedrick & Robinson (Doc. No. 153, filed March 31, 1989) and Memorandum in Support of their Motion for Summary Judgment (Doc. No. 162, filed April 24, 1989) and Memorandum of Law filed by Plaintiff in Opposition to Defendants, Donald M. Simpson's and Terry C. Young and Giles, Hedrick & Robinson's Motions for Summary Judgment (Doc. No. 182, filed June 16, 1989).

2. Motion to Dismiss Third Amended Complaint with Prejudice by Defendant Donald M. Simpson with Supporting Memorandum of Law (Doc. Nos. 112 and 113, filed December 8, 1986), Motion of Defendant Donald M. Simpson for Summary Judgment and Memorandum in Support thereof (Doc. Nos. 165 and 166 filed April 28, 1989), and Memorandum of Law filed by Plaintiff Eleanor S. Simpson in Opposition to Defendants, Donald M. Simpson's and Terry C. Young and Giles Hedrick & Robinson's Motions for Summary Judgment (Doc. No. 182, filed June 16, 1989).

3. Motion for Entry of Judgment Upon Order of Dismissal as to Defendant Tanya Plaut by Plaintiff and Memorandum of Law in Support of Plaintiff's Motion for Entry of Judgment (Doc. Nos. 128 and 128, filed March 2, 1987) and Motion of

Plaintiff to Reconsider its Order granting Defendant Tanys Plaut's Motion to Dismiss Plaintiff's Third Amended Complaint (Doc. No. 115, filed December 18, 1986).

4. Motion to Dismiss Third Amended Complaint by Defendant Minnie Bridges with Supporting Memorandum of Law (Doc. Nos. 119 and 120, filed December 19, 1986) and Memorandum in Opposition (Doc. No. 123, filed January 16, 1987), Motion for Summary Judgment on behalf of Minnie Bridges d/b/a Minnie Bridges Realty with Memorandum in Support (Doc. No. 156, filed April 3, 1989) and Memorandum of Law filed by Plaintiff in Opposition to Defendant, Minnie Bridges' Motion for Summary Judgment (Doc. No. 184, filed June 19, 1989.

5. Notice of Filing Affidavit of Plaintiff (Doc. No. 177, filed May 25,

1989).

6. Motion to Dismiss Third Amended complaint by Defendant Lawson Lamar with Supporting Memorandum (Doc. No. 114, filed December 8, 1986) and Memorandum in Opposition (Doc. No. 116, filed December 18, 1986), Motion to Defendant Lawson Lamar for Summary Judgment (Doc. No. 168, filed May 1, 1989) and Memorandum of Law in Opposition to Motion of Defendant Lawson Lamar for Summary Judgment (Doc. No. 181, filed June 16, 1989).

I

DISMISSAL OF CLAIMS AGAINST TANYA PLAUT WITH PREJUDICE

The Motion of Defendant Tanya Plaut to Dismiss Third Amended Complaint having been granted by Judge Sharp (Doc. No. 106, filed December 2, 1986), Plaintiff's Motion for Entry of Judgment Upon Order of Dismissal (Doc. No. 128) is GRANTED. The Motion to Reconsider filed by

Plaintiff (Doc. No. 115) is DENIED.

II

CLAIMS MADE PURSUANT TO 42 U.S.C. SECTION 1983

The essential facts upon which the Plaintiff predicates her Third Amended Complaint have been recited in a previous Order of the Court (Doc. No. 47, filed October 28, 1985). In order to state a claim in federal court under 42 United States Code Section 1983, as asserted in Counts I, II, IV, and V 1 Plaintiff must allege that Defendants conspired together (1) under color of state law, (2) to deprive Plaintiff of a federally protected right. 42 U.S.C. Section 1983.

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1 It is unclear whether Plaintiff is asserting in Counts IV and V a violation of 42 U.S.C. Section 1983 or 42 U.S.C. Section 1985(3). In an abundance of caution, therefore, this court will consider the allegations therein under both statutes. See infra, at pages 15-18 for a discussion of these claims under 42 U.S.C. Section 1985(3).

See also Lugar v. Edmundson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

The "under color of state law" factor requires Plaintiff to demonstrate either that there was a state actor or that the Defendants who are private individuals conspired with a state actor. See Dennis v. Sparks, 449 U.S. 24, 27-29 (1980). The only state actor who is a Defendant in this action is Lawson Lamar who was at the time of the events alleged a county sheriff. As to the other Defendants, Plaintiff alleges (1) that they conspired with Defendant Lamar and various judges who were involved in both the divorce proceeding and the events leading to the sheriff's sale of Plaintiff's one half interest in her home of 22 years and/or (2) that the use of Florida's laws on sheriff's sales provides a sufficient

nexus with the state to satisfy the state action requirement under 42 U.S.C. Section 1983.

A. Conspiracy with State Judges

Taking the allegations involving the judges first, the "color of state law" requirement may be satisfied by demonstrating that an official act of a judge was the result of a conspiracy between the judge and private actors. This is true even though the judge may be immune from liability for official acts. Dennis Sparks, 449 U.S. 26 (1980); Phillips v. Mashburn, 746 F.2d 782, 785 (11th Cir. 1984).

In this case, all of Plaintiff's allegations which rely on the status of a judge to satisfy the "under color of state law" requirement depend solely on conclusory statements that there was a conspiracy. The law in the Eleventh

Circuit is that "[t]he naked assertion of a conspiracy between a state judge and private defendants without supporting operative facts provides an insufficient state action nexus for a section 1983 action." Phillips v. Mashburn, 746 F.2d 782, 785 (11th Cir. 1984). 2

This complaint is essentially a complaint about the decisions of state court judges under the guise of a Section 1983 action. Federal courts, however,

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2 The Eleventh Circuit also quoted with approval Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983) in which the Tenth Circuit said:

> When a Plaintiff in a Section 1983 action attempts to assert the necessary "state action" by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action... The standare is even stricter where the state officials allegedly involved in the conspiracy are immune from suit, as are the state court judges here.

are not a forum for appealing state court decisions. Staley v. Ledbetter, 837 F.2d 1016, 1018 (11th Cir. 1988) (affirming dismissal for lack of subject matter jurisdiction when Plaintiff sought to reverse a state court's child custody determination); Collins v. Collins, 597 F. Supp. 33 (N.D. Ga. 1984); O'Connor v. O'Connor, 315 F.2d 420 (5th Cir. 1963).

Plaintiff contends that she has tried to obtain a remedy from the state courts but has been unsuccessful in obtaining the relief requested because of misrepresentations made by Defendants before the courts. Accepting this allegation as true, Plaintiff's complaint becomes one of misuse or abuse of legal process which is not a basis for a claim under 42 U.S.C. Section 1983. See e.g., McDougald v. Jenson, 786 F.2d 1465, 1488-89 (11th Cir. 1986) (explaining that it

is the general rule in this Circuit that a private individual does not act under color of state law by engaging in litigation, even in bad faith, unless that individual is compelled by state law to bring suit or is acting under the authority or pretense of authority of the state), cert denied, 479 U.S. 860 (1986); Collins v. Walden, 613 F.Supp. 1306 N.D. ga. 1985), aff'd without opinion, 784 F.2d 961 (11th Cir. 1986); Dalhberg v. Becker, 581 F. Supp. 855, 861-63 (N.D. N.Y.) (noting that challenge of misuse or abuse of state procedures does not supply "under color of state law" nexus), aff'd), 748 F.2d 85 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

The Third Amended Complaint therefore is devoid of allegations of fact showing an agreement and concerted action among the Defendants and the judges named in

the Complaint. There are simply no operative facts, merely a naked assertion by the Plaintiff in her pleading, that a conspiracy existed. As such Plaintiff's Third Amended Complaint fails to state a claim of conspiracy in violation of 42 U.S.C. Section 1983 with state court judges. 3

Defendants' Motions for Summary Judgment also indicate that Plaintiff's allegations of a conspiracy with state court judges are unsupported by any evidence. Additionally, Plaintiff's Affidavit presents no evidence in support of this claim. (Doc. No. 177, filed May 25, 1989). Plaintiff asserted in her deposition that she knows that there is a conspiracy against her because all the

3 See also Dewey v. University of New Hampshire, 694 F. 2d 1, 3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983).

judges ruled against her, and Judge Gridley used a proposed order prepared by counsel for her former husband instead of her proposed order. 4

Plaintiff has had sufficient opportunity to gather evidentiary support for her claims. This action was commenced in April of 1985. Discovery has been extended either by request of the Plaintiff or by joint motion of the parties on numerous occasions. 5 Further, Defendants attempted unsuccessfully to stay Plaintiff's depositions and to limit the scope of the

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4 Plaintiff also stated in her deposition that she would not be complaining at this time if the judge had used her proposed order. Therefore, the essence of Plaintiff's complaint is that the judges' decisions did not favor her.

5 See Doc. Nos. 77, 85, 92, 99, and 150.

depositions.

This court finds that, as required under Rule 56 of the Federal Rules of Civil Procedure, Defendants have carried their burden of demonstrating that there are not genuing issues of material fact that necessitate a trial, and Plaintiff has failed to offer any proof of a conspiracy involving a judge. Having failed to prove an essential element of her case, summary judgment is appropriate on Plaintiff's claim of a conspiracy involving state judges in violation of 42 U.S. C. Section 1983. See Celotex Corp. v. Cartrett, 477 U.S. 317 (1986) (noting that summary judgment is appropriate when the opposing party does not make a sufficient showing on an essential element of her case with respect to which she has the burden of proof). See also Matsushita v. Zenith Radio Corp., 475

U.S. 574 (1986) (explaining that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts"); Adickes v. S.H. Kress & Co., 398 U.S. 144, 161-63 (1970).

B. Conspiracy with County Sheriff

In addition to allegations of a conspiracy involving state court judges, Plaintiff alleges that various Defendants conspired with Sheriff Lawson Lamar to deprive her of a federally protected right. 6 In Counts I, II, IV and V

6 In Count One Defendant Lamar is not named as a party, but Defendants Simpson, Young, and GHR are alleged to have caused a deputy sheriff to (1) seize Plaintiff's property (Complaint paragraph 14), (2) use excessive force during Plaintiff's arrest (Complaint paragraph 16 and 17), (3) imprison Plaintiff falsely (Complaint paragraph 19), and (4) arrest Plaintiff without a warrant which was the result of Defendant Lamar's insufficient policies and failure to properly instruct his

Plaintiff alleges that Defendants Donald M. Simpson ("Simpson"), Terry C. Young ("Young"), Giles, Hedrick & Robinson,

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deputy sheriff (complaint paragraph 22). Plaintiff's assertion that Defendants Simpson, Young, and GHR wrongfully caused these actions of the sheriff's office is unsupported by evidence. The allegations concern actions occurring during the forcible entry of the house which the sheriff's office undertook pursuant to state court order. This same court order also gave the sheriff's office the authority to arrest anyone who resisted the entry. Plaintiff admits that she objected to the seizure of some of the items. Complaint paragraph 16; Affidavit paragraph 14. Moreover, the order permitting the forcible entry was the result of Plaintiff's refusal to comply with a prior state court order which divided the marital property. These alleged wrongs are based on decisions of state court judges and are not properly revieved by this court within the context of a section 1983 action. As to the allegations concerning excessive force, see infra at , pages 13-14.

P.A. ("GHR"), Plaut, 7 and Bridges conspired with the sheriff ("Lamar") to cause deprivations of various constitutional rights. Assuming for purposes of the motions under consideration that Plaintiff has stated a claim for conspiracy pursuant to 42 United States Code Section 1983 because of the allegations of wrong doing by Lamar, Simpson, Young, GHR, and Bridges, the unrefuted facts presented on Motions for Summary Judgment reflect that Plaintiff cannot support the allegations she has made.

First, as to Defendant Young and GHR conspired with the sheriff's deputies to deprive her of rights secured by 42

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7 As a result of this Court's denial of Plaintiff's Motion to Reconsider the dismissal of Plaut from the Third Amended Complaint, this court need not reach the allegations concerning such Defendant.

United States Code Section 1983.

Plaintiff's affidavit relies upon a repetiton of the conclusory allegations made in the Third Amended Complaint 8 On

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8 Plaintiff defends against the Motions for Summary Judgment by asserting that :

Plaintiff has offered circumstantial evidence of Defendants' conspiracy to deprive Mrs. Simpson of her rights. A constitutionally infirm sheriff's sale of Mrs. Simpson's home took place April 30, 1984. The creditor, Tanya Plaut, held a lien of $8,013.87, attaching it to Mrs. Simpson's one-half interest in a $200,000.00 residence. The sole bidder was Defendant, Donald M. Simpson. He was represented at the sale by counsel, Defendants, Terry C. Young and Giles, Hedrick & Robinson. Defendant, Donald M. Simpson, obtained Mrs. Simpson's half interest for a bid of $8,013.87. Defendants, immeidately following the sheriff's sale, sold the residence through realtor Defendant, Minnie Bridges, one day after its listing and over $60,000.00 below its market value. Minnie Bridges was refereed to Donald Simpson by Terry Young. Deposition of Donald M. Simpson, May 1, 1986, p. 10.

Plaintiff's Memorandum of Law in Opposition to the Motions of Defendants Donald M. Simpson, Terry C. Young, and Giles, Hedrick & Robinson for Summary Judgment (Doc. No. 182, filed June 16, 1989, at pp.

the other hand, there is clear and unambiguous testimony from Defendant Young, the only attorney of GHR who was involved in any of the events about which Plaintiff complains, that he did not conspire with any member of the sheriff's department. Plaintiff has not made a sufficient showing to establish the existence of an essential element of her case, and therefore, the Motion of Young and GHR for Summary Judgment as to Counts I, II, IV and V of the Third Amended Complaint is GRANTED.

This court finds that the allegations involving Defendant Bridges are without merit. The unrefuted facts of record reflect that Defendant Bridges, a real

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25-25). Accepting these statements as true, these statements do not establish a conspiracy and are not sufficient to withstand the Defendants; Motions for Summary Judgment

estate broker, sold a house for Defendant Simpson. There is no evidence that Defendant Bridges praticipated in a conspiracy.

Similarly there is no evidence that Defendant Lamar participated in a conspiracy with the other Defendants to deny Plaintiff her civil rights in violation of 42 U.S.C. Section 1983. Therefore, the Motion of Lawson Lamar for Summary Judgment on this issue as asserted in Counts II, IV and V of the Third Amended Complaint is GRANTED.

Plaintiff also sues Defendant Lamar in Counts II, IV and V claiming, inter alia, that he acted under color of state law when he authorized an unconstitutionally infirm judicial sale. 9 Plaintiff first

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9 As noted earlier, Defendant Lamar is not made a defendant in Count I of the Third Amended Complaint.

complains that the homescead act is unconstitutional 10 second that the notice given to Plaintiff was inadequate, and lastly that the price which was ultimately obtained for her interest in the home resulted in a defective judicial sale because "where such inadequacy is connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the judicial sale is defective." Plaintiff's Memorandum of Law in Opposition to Defendant Lawsom Lamar's Motion for Summary Judgment (Doc. No. 181, filed June 16, 1989, at p. 7 (citation omitted). Plaintiff contends that "inadequate notice connected with a mistake or fraud on part of any

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10 See infra at page 17-18 for a discussion of the constitutionality of Florida's homestead act.

participating parties results in a defective sale." Id. at 7-8.

This court finds that there is no genuine issue of material fact as to the notice of the sale and that the notice published was not inadequate. The notice published in the newspaper announced that the sale would take place between the hours of 11:00 a.m. and 2:00 p.m. on a particular day. In fact, Plaintiff had been active, albeit unsuccessful, in attempting to stop the sale of her one half interest in the realty. 11 Plaintiff attended the sale, arriving after 11:00 a.m. and after the time the

11 Plaintiff also complains about a hearing which Plaintiff initiated prior to the sale in which she was unsuccessful in blocking the sale of the property because of the "animosity to Plaintiff due to Plaintiff's complaints of unfair treatment by other judges." Complaint 41 L.

realty was sold but prior to 2:00 p.m. Further, there are no facts to support Plaintiff's contention that thee was mistake, fraud, misconduct or other irregularity in such sale. 12 As a result of this Court's findings that there was no defective notice and sale, this court GRANTS Defendant Lamar's

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12 To the extend that Plaintiff may be asserting that the actions of Defendants under the state laws provide the requisite nexus with state activity to qualify under the "color of state law" requirement under Lugar v. edmonson Oil Co., 457 U.S. 922 (1982) and Fuller v. Hurley, 559 F. Supp. 313 (W.d. Va. 1983), the facts in this case are dramatically differenct from those presented in Lugar and Fuller where prejudgment attachments were attacked in section 1983 actions. In this case, the actions were all taken pursuant to state court order after notice was given and hearings were held. The state appellate process rather than the federal court is therefore the appropriate vehicle to attack both the proceedings and the actions which were taken as a result of the proceedings.

Motion for Summary Judgment on this issue as it is alleged in Counts II, IV and V.

Finally, in Counts IV and Count V Plaintiff incorporates by reference Count I which includes the allegation the a deputy sheriff used excessive force in arresting Plaintiff during the forcible entry of Plaintiff's house. Plaintiff states in her affidavit that during her arrest she was assaulted and physically injured by the deputy sheriff's use of excessive force which bruised her, caused her to faint, and also caused other unspecified injuries. Affidavit, paragraph 14. Defendant Simpson asserts in his deposition that he saw the members of the Orange County Sheriff's Office use very little or no force and that he saw no physical contact other than the deputy sheriff taking Plaintiff by the arm when she was being detained. Deposition of

Donald M. Simpson at 124-125.

Plaintiff has not sued the deputy sheriff who affected her arrest. She has, however, named Lawson Lamar, as sheriff of Orange County, Florida as Defendant. Suing Defendant Lamar in his representative capacity is generally "only another way of pleading an action against an entity of which an officer is an agent." Monell v. Department of Social Servs., 436 U.S. 658, 690, n. 55 (1978).

Plaintiff may not assert a cause of action against Defendant Lamar for the actions of a deputy sheriff under the doctrine of respondeat superior. Id. In order to recover for the actions of the deputy sheriff Plaintiff must demonstrate that the constitutional deprivation was the result of a governmental custom, policy, ordinance, regulation or decision

officially adopted and promulgated by the unit's officers. Id. at 690-91.

Therefore, it is clear that Plaintiff''s action against Defendant Lamar will be successful only if a causal link is established between an official policy, ordinance, practice or custom, express or implied, and the plaintiff's injury. Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir, 1986). Plaintiff alleges in her Third Amended Complaint that the sheriff "failed to have sufficient policies and failed to properly instruct the deputy in the protection of Plaintiff's civil rights." Complaint at paragraph 22. Defendant Lamar has not, however, addressed this issue.

Therefore, Defendant Lamar's Motion to Dismiss the Third Amended Complaint on this issue is DENIED and Defendant shall respond to these allegations in Counts IV

and V within seven (7) days from the date of this Order. The Court reserves ruling on the Motion of Defendant Lamar for Summary Judgment onthis issue as asserted in Counts IV and V of the Third Amended Complaint and directs such Defendants to file a supplement to such Motion, if appropriate, within seven (7) days from the date of this Order. Plaintiff shall respond to this supplement within ten (10) days of Defendant Lamar's supplement. The Court will take this issue under advisement on July 31, 1989, at 5:00 p.m. A hearing will not be held on this matter.

Therefore, Plaintiff's claims for violations of 42 U.S.C. Section 1983 in Counts I, II, IV and V are DISMISSED with prejudice as to all Defendants on all issues except the claim against Defendant Lamar concerning the policy or custom of

the sheriff's office which is alleged to have resulted in the deputy sheriff's use of excessive force on Plaintiff during her arrest.

III

CLAIMS MADE PURSUANT TO 42 U.S.C. SECTION 1985(3)

In Counts IV, V and VII Plaintiff sues Defendants Simpson, Young, GHR, Plaut, Lamar, and Bridges for violations of 42 United States Code Section 1985(3).

To state a cause of action under 42 United States Code Section 1985(3), it is necessary for a complaint to allege four elements: (1) a conspiracy (2) to deprive, directly or indirectly, any person or class of persons of equal protection or a privilege or immunity protected by law; (3) that the conspirators committed some act in furtherance of the conspiracy; and (4) that the plaintiff was "injured in his

person or property" or was "deprived of having and exercising any right or privilege of a citizen of the United States." Griffin v. Breckenridge, 403 U.S. 88, 103-04 (1971). Under 42 United States Code Section 1985(3) it is unnecessary that the conspiracy involve a state actor. See Griffin v. Breckenridge, 403 U.S. 88 (1981).

In order to withstand a motion to dismiss, the Plaintiff must assert at least minimum factual support for the existence of a conspiracy. Robinson v. McCorkle, 462 F.2d 111, 113 (3d Cir.), cert. denied, 409 U.S. 1042 (1972). Again, it is necesssary that the complaint state more than conclusory allegations of deprivations of constitutional rights. Id. at 113. Plaintiff is not entitled to pursue an action merely because she believes,

without factual support, that a conspiracy existed.

Not only does Plaintiff's Complaint fail to plead facts to support a conspiracy in violation of 42 U.S.C. Section 1985(3), making a motion to dismiss appropriate, but also there are no evidentiary facts of record to support such contention.

A. Count IV

Plaintiff conplains about the actions which took place during the divorce proceeding as well as the events which took place proceeding, during, and after the sheriff's sale. The record reflects that Defendants Simpson, Young, and GHR were adversaries to Plaintiff in a contested state court proceeding, and their actions therein do not constitute the basis for a claim for damages under 42 United States Code Section 1985(3).

As to the actions involving the sheriff's sale, Defendants Simpson, Young, and GHR were merely participating in a sheriff's sale that was the result of a lien placed on Plaintiff's interest in realty by Tanya Plaut and an order of a state trial court for foreclosure of such lien. There is no evidence of a plot to initiate and consummate the sale in an improper manner, unauthorized by law, to deprive Plaintiff of her property. Participation in a public sale does not constitute evidence of a conspiracy in violation of 42 U.S.C. Section 1985(3).

Defendant Bridges merely sold the house for Defendant Simpson. The fact that Defendant Young may have referred Defendant Simpson to a realtor is not evidence of a conspiracy between the lawyer, the lawyer's firm, the client,

and the realtor. Defendant Bridges owed no duty to Plaintiff, and there are no facts alleged in the evidence of record that she participated in any conspiracy.

Defendant Lamar carried out an order of a state court judge and executed the sale pursuant to statute. The statute itself is not unconstitutional. There are no facts alleged nor is there evidence of record to support Plaintiff's contention that Lamar conspired against her in violation of 42 U.S.C Section 1985(3). Therefore, the Motions of Defendant Bridges, Simpson, Young, GHR and Lamar to Dismiss Count IV for failure to state a claim under 42 U.S. C. Section 1985(3) are GRANTED. In the alternative, Summary Judgment is granted in favor of such Defendants and against Plaintiff on Count IV.

Count V, Plaintiff sues Defendants Simpson, Young, GHR, Plaut, and Lamar and complains that she has been denied her constitutinal right to own and hold homestead property because "the Florida constitutional provison in effect at the time of the forced sale of her homestead disallowed the forced sale of homestead of married or single persons, but not for single women who were heads of their own households...."[13]

In pertinent part, the Florida homestead provision to which Plaintiff is referring applied, prior to November of 1984, only to property "owned by the head

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13 Plaintiff also makes the conclusory allegation that she was discriminated against because of her status as a former wife of a retired military officer without factual support for this contention. (Complaint paragraph 67).

of a family." 14 "Head of family" is defined as applying to those who are responsible, either legally or morally, for the welfare of someone else. Edward Leasong Corp. v. Uhlig, 652 F. Supp. 1409 (S.D. Fla. 1987); Flannery v. Green, 482 So.2d 400 (Fla. 2d DCA 1986), In re Schoor's Estate, 409 So.2d 487 (Fla. 4th DCA 1982). This provision does not discriminate on the basis of gender, which might have stated a claim under 42 U.S.C. Section 1985(3). Califano v. Goldfarb, 430 U.S. 199 (1977), Holden v. State of Gardner, 420 So.2d 1082 (Fla. 1982). Nor does the provision discriminate between persons who are married and persons who are single. Any person, single or married, who is

14 This provision was amended after the events which are the basis for this action to apply to property owned by a "natural person."

responsible for the welfare of another and resides on property is entitled to the constitutional homestead protection. Plaintiff neither alleges nor contends that she is responsible for the welfare of another while she resided on the subject property. Plaintiff has not stated an independent claim for denial of equal protection under 42 U.S.C. Section 1985(3), and the Motions for Summary Judgment as to Count V are GRANTED.

C. COUNT VII

Count VII asserts that Defendants Simpson, Young, GHR, Plaut, Bridges, and Lamar breached various duties which Plaintiff claims they owed to her. For instance, Plaintiff alleges that Defendants owed a duty to Plaintiff to protect and not to acquire a greater interest in the homestead property of the Plaintiff other than what was awarded to

Defendant Simspon by the Final Judgment, and that Terry Young, her former husband's attorney owed her a duty not to take unfair advantage of her distressed situation.

The wrongs about which Plaintiff complaints arise out of state court litigation in which Plaintiff was an adverse party to Defendant Simpson, who was represented by Young of GHR. The Civil Rights Statutes are not intended to make federal courts appellate courts for review of actions of the state trial courts. Further, Plaintiff has alleged no facts, and none appear of record, to support her contention that any of these Defendants were part of a conspiracy to deprive Plaintiff of a privilege or immunity secured to her by the United States Constitution.

Additionally, it appears from the unrefuted facts of record that Defendant Minnie Bridges did not have a fiduciary duty to Plaintiff, such Defendant being a real estate broker who listed property for sale after Defendant Young had recommended her to his client Defendant Simpson.

Finally, Count VII fails to allege any facts or state a cause of action against Defendant Lawson Lamar.

Therefore, the Motions for Summary Judgment in favor of Defendants Young, GHR, Simpson, Lamar, and Bridges as to Count VII are GRANTED.

IV

CONSTITUTIONALITY OF FLORIDA STATUTE 56.22

In Count III, Plaintiff asserts that the estate statute pursuant to which the forced sale of Plaintiff's home was

conducted, Florida Statute Section 56.22 (1983), is an unconstitutional deprivation of Plaintiff's right to procedural due process because it is void for vagueness due to its provision that the "sale shall take place between the hours of 11:00 a.m. and 2:00 p.m."

Plaintiff alleges in the Count that Defendants Simpson, Young, GHR, Lamar, Plaut, and Bridges operated under an unconstitutional statute to deprive Plaintiff of her property. Plaintiff claims that the statute did not give her notice of the exact time of sale, and therefore the statute is unconstitutional. Plaintiff does not claim that she did not receive notice of the sale or that the sale occurred outside the time specified. Plaintiff simply alleges that the statute is unconstitutional and the sale void

because she was not given a particularized time between the hours of 11:00 a.m. and 2:00 p.m. for the sale.

From the unrefuted facts of record, the sale was conducted pursuant to a lien placed on Plaintiff's share of the house by her former attorney, Ms. Plaut. Young testified that he heard of the sale when his secretary saw the notice in the newspaper. He called the sheriff's office to ascertain the procedure for the sale. Young, GHR, Simpson, and Bridges were not involved in the action which led to the lien being placed on the house. Defendant Bridges had no connection with the Sheriff's sale. Plaintiff has no evidence to support her allegation that there was a conspiracy regarding the sale of the house among Defendant Bridges and the other Defendants named in this Count. defendant Simpson merely took advantage

of the procedure provided by law and appeared at the designated time to place a bid on the property. Plaintiff had the same opportunity to appear at the designated time to bid on the property. Defendant Lamar merely conducted the sale pursuant to law and in accordance with a state court order. There is no evidence of any inappropriate connection between the parties. The Court finds no reason to set aside the sale or declare that the statute is unconstitutional. Therefore, Defendants' Motion for Summary Judgment on Count III are GRANTED.

V

CLAIM MADE PURSUANT TO 18 U.S.C. 2520

In Count IX Plaintiff alleges that in violation of 18 U.S.C. Section 2520 Defendant Simpson, Young, and GHR placed an electronic eavesdropping device on her personal telephone for a period of

twenty-four months and that Plaintiff discovered the device during the month of March, 1984.

While the allegations of Count IX are sufficient to withstand a motion to dismiss, there is no evidence of record to support Plaintiff's contention that Defendants Young and GHR placed such device on her telephone. Plaintiff's affidavit (Doc. No. 176) is silent on this claim. Defendant Young in his deposition directly denies any knowledge of or involvement in wiretapping or electronic eavesdropping on Plaintiff's telephone by Defendant Simpson (Doc. No. 162, p.51). Plaintiff in her deposition speculated that Tim Simpson put a bug on her telephone because he had possession of the house for five months while she was gone, and "bacause he is the only one who would dream up something like that."

(Doc. No. 182, at p. 52). Plaintiff did not respond to a request that she turn the wiretap over to Defendants, stating in her deposition that she sent it to Washington. She further testified that a neighbor discovered the wiretap, but the record contains no statement by the neighbor.

Therefore, Plaintiff has failed to carry her burden to come forward with competent evidence in support of her claim that Defendants GHR and Young violated 18 U.S.C. Section 2520. Summary Judgment is GRANTED in favor of such Defendants and against Plaintiff on Count IX of the Third Amended Complaint.

Defendant Simpson in his Motion for Summary Judgment does not clearly address Count IX. Further there are no evidentiary facts of record presented by Defendant Simpson refuting Plaintiff's

claim that he placed a wiretap on her telephone in violation of 18 U.S.C. Section 2520. Additionally, the Court cannot ascertain if Tim Simpson, referred to by Plaintiff in her deposition, and Defendant Donald Simpson's Motion to Dismiss this Count of the Third Amended Complaint is DENIED, and such Defendant shall file his response to this Count within seven (7) days from the date of this Order. The Court reserves ruling on the Motion of Defendant Simpson for Summary Judgment as to Count IX of the Third Amended Complaint and directs such Defendant to file a supplement to such Motion, if appropriate, within seven (7) days from the date of this order. Plaintiff shall respond to such supplement within ten (10) days of the filing of such supplement. No hearing will be held on such supplemented motion

for summary judgment, and the supplemented motion of Defendant Simpson for summary judgment will be taken under advisement by the Court at 5:00 p.m. on July 31, 1989.

VI

A. COUNT VI

In Count VI Plaintiff seeks a declaratory judgment under the doctrine of pendent jurisdiction and asserts that the profits from the sale of the house should be held in a resulting or constructive trust because the final judgment in the state court divorce proceeding awarded her a half interest in the house. Additionally, Plaintiff claims that Defendant Simpson purchased the house with her money. Although the allegations in this Count reference Defendants Young and GHR, Plaintiff names only Mr. Simpson as a Defendant in this

Count.

Plaintiff is essentially contending that her former husband improperly purchased her one half interest in the house at the sheriff's sale, sold the house, and made a profit from it.

The record is absolutely devoid of any evidence in support of the claim that the money from the sale of Plaintiff's half interest in the house should be held in a resulting or constructive trust for her. Additionally, Plaintiff's former husband, his attorney, and his attorney's law firm do not owe Plaintiff the duties she alleges in this Count as they were involved as adversaries in a state court legal proceeding. Therefore, having ascertained no facts of record to support Plaintiff's contentions in Count VI, Defendants Simpson's Motion for Summary

Judgment is GRANTED. 15 Count VI of the Third Amended Complaint is DISMISSED.

B. Count VIII

In Count VIII, Plaintiff seeks the pendent jurisdiction of this Court and sues Defendants Simpson, Young, GHR, and Lamar for the false arrest of Plaintiff on or about October 6, 1983.

In exercising the Court's discretionary jurisdiction over this

15 Having dismissed the allegations which attacked Defendant Simpson's purchase and sale of the house because of the claimed invalidity of the homestead exemption in the Florida Constitution, having found that the sheriff's sale was not defective, and having determined that Plaintiff's recourse for alleged wrongs occurring during the pendency of the state court proceedings lies within the jurisdiction of the state appellate courts, this Court has considered declining to exercise its pendent jurisdiction over Count VI. United Mineworkers of America v. Gibbs 383 U.S. 715, 725 (1966). In the interest of judicial enconomy, the Court has determined this claim.

claim, the Court concludes that Summary Judgment is appropriate as to Count VIII. The unrefuted facts of record show that the sheriff's office acted pursuant to a state court order which granted permission for forcible entry of Plaintiff's house during recovery of Defendant Simpson's personal property. This order was granted after a hearing which Plaintiff attended. The court order gave the sheriff the authority to arrest any person who interfered with the execution of the order.

Plaintiff's Third Amended Complaint states that she protested the taking of some items of personal property and was then arrested. Complaint paragraph 16. Plaintiff's affidavit acknowledges that she objected to the seizure of the items during the entry. (Doc. No. 177, filed May 25, 1989 at paragraph 14.) Further,

Plaintiff stated in her deposition that she resisted arrest. Therefore, there is no evidence of record to show that Plaintiff was falsely arrested. Ther sheriff's deputy was executing a state court order when he went to the house and ultimately arrested Plaintiff on that occasion. Defendants Young and Simpson were merely pursuing legal means as adversaries to Plaintiff in a legal proceeding to recover Defendant Simpson's property. In essence, Plaintiff is complaining about state court orders which divided the marital estate and gave Defendant Simpson the right and means to recover his property. 16 Based on the

16 It is unclear whether this count is being asserted solely as a pendent claim or as a claim pursuant to 42 U.S.C. 1983. The Court finds that the unrefuted facts of record demonstrate that summary judgment is appropriate on Count VIII regardless of whether this claim is considered as a claim pursuant to 42 U.S.C. Section 1983 or as a pendent claim

unrefuted facts of record, Summary Judgment as to Count VIII is GRANTED in favor of Defendants.

CONCLUSION

The Third Amended Complaint is DISMISSED WITH PREJUDICE as to all counts and as to all parties except the allegations concerning the deputy sheriff's use of excessive force during Plaintiff's arrest in Counts IV and V and the allegations as to Defendant Simpson in Count IX. The Court reserves ruling on Defendant Simpson's Motion for Summary Judgment on Count IX of the Third Amended Complaint and Defendant Lamar's Motion for Summary Judgment on Counts IV and V of the Third Amended Complaint in accordance with his order.

DONE AND ORDERED in Chambers at

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for false arrest.

Orlando, Florida this 10th of July, 1989.

/S/ PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record
in 85-455-CIV-ORL-19

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NO: 85-455-Civ-Orl

I certify the foregoing to be a true and correct copy of the original.
DONALD M. CINNAMOND, Clerk
United States District Court
Middle District of Florida
By: /S/ Deputy Clerk

ELEANOR S. SIMPSON

-V-

DONALD M. SIMPSON, TERRY C. YOUNG, GILES, HEDRICH & ROBINSON, P.A. TANYA PLAUT, MINNIE BRIDGES AND LAWSON LAMAR, SHERIFF, ORANGE CO. FL.
DEFENDANTS /

NOTICE OF APPEAL OF A FINAL SUMMARY JUDGEMENT

COMES NOW Eleanor S. Simpson in Proper Person and timely files this her Notice of Appeal of the Court Order dated July 10, 1989 by the Honorable Judge Patricia Fawsett of the Middle District of Florida, UNITED STATES DISTRICT COURT, Orlando Division.

Judge Fawsett dismissed with Prejudice

to all counts and to all parties the Third Amended Complaint originally scheduled to be tried in its entirity with a Trial by Jury during the August term, 1989. This dismissal was dated July 10, 1989. Pre-trial was scheduled for July 11, 1989 in the Office of Duncan Dowling, Attorney. My attorney, Judge Douglas Lambeth and his legal assistant flew from Ft. Lauderdale to Orlando, FL. for this Pre-Trial Compliance, July 11, 1989. When he arrived in Orlando he was informed that Judge Fawsett had already:

"dismissed the Third Amended Complaint with Prejudice as to all counts and as to all parties except the allegations concerning the deputy sheriff's use of excessive force during plaintiff's arrest in Counts 4 & 5 and the allegations as to defendant Simpson in Count 9. The court reserved ruling on Defendant Simpson's Motion for Summary Judgement on Count 9 of the Third Amended complaint and Defendant Lamar's Motion for Summary Judgement on Counts 4 & 5 of the Third Amended Complaint. No hearing was to be held. The Court will take the motion for summary

judgement under advisement on July 31, 1989 at 5:00pm s/Judge Fawsett 7-10-89 EOD 07-19-89, Copies to Counsel."

The docket sheets at the U.S. District Court are all stamped with Appeal --Jury Trial as the result of an Order dated

"7-29-85 NR 28 Order In accordance with Federal Rule of Procedure 60 (a) the Clerk of Courts is directed to RE-OPEN the case file. Plaintiff has (20) days within which to amend her complaint. Judge Sharp s7-29-85 EOD 7-29-85 etc. cert. copy to USCA.".
Following this Re-Open order from the 11th District Court of Appeals Mr. James Lavigne subsequently filed 1st Amended Complaint, 2nd Amended Complaint and finally Third Amended complaint compying with all the directions of the then presiding Judge Kendall Sharp.

Judge Fawsett has dismissed this Third amended Complaint previously set for Trial with No Hearings what so ever. Reverable Error has been made & there does exist a conflict if interest since the following are known facts in Case

Fed #85-455:

1. When Case Fed #85-455, April 16, 1985 started with COMPLAINT: Violation of Civil Rights-that the Defendants have conspired to defeat the Plaintiff of her Homestead Property without Due Process, Defendant Lawson Lamar was Sheriff of Orange County, Fla. but since the election of 1988, Lawson Lamar is presently State Attorney.

2. Defendant, Terry Young, Attorney is the Nephew of Judge George Young, Chief Judge of U.S. Middle District of Fla. Mr. Young coincidentally was my ex-husbands Attorney where I was scheduled to be the Landmark case in the State of Fla. on Federal Law 97-252. As the result of a Per

Curiam Affirmance at the 5th District Court of Appeals Jan. 29, 1984, my Writ of Certiorari is on file in this case #85-455 this was taken to the Supreme Court of the United States by Mr. Robert Shapiro from the Tampa, Fla. area. They dismissed my writ of certiorari there stating it was up to the State of Florida regarding dividing a military pension and Martin Company Pension as Equitable Distribution of Marital Assets.

3. Minnie Bridges, Realtor sold my Homestead while it was at 5th D.C.A. Case #Civ. 81-12127. She is the sister of Judge Cecil Brown, 9th Circuit Court, Orlando, Fla.

All parties on the attached sheet are called upon to take Notice. I hereby

certify that a copy of the foregoing has been furnished this date by mail delivery to the attached sheet.

I further certify that this Notice of Appeal is being hand delivered to the United States Federal Court-Middle District on the 4th day of August, 1989.

/S/ Eleanor S. Simpson
Eleanor S. Simpson-Pro Se
10751 William Tell Dr.
Orlando, FL 32821
Telephone #407-351-2018

Please note: Eleanor S. Simpson is acting Pro Se for Appeal purposes. Judge Lambeth is still her Attorney of Record.

FILED AUG 7, 1989

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ELEANOR S. SIMPSON

Plaintiff

v.

DONALD M. SIMPSON, et al.

Defendants

_____/

ORDER

This case comes before the Court on the following Motions:

1. Defendant Simpson's Supplemental Motion for Summary Judgment (doc. No. 197, filed July 14, 1989), Memorandum in support of Supplemental Motion for Summary Judgment (Doc No. 198, filed July 14, 1989), and Notice of Filing Affidavit in Support of the Supplemental Motion for Summary Judgment (doc. No. 200, filed July 14, 1989), and Plaintiff's Response

to Defendant Simpson's Supplemental Motion for Summary Judgment.

2. Defendant Lamar's Supplement to Motion for summary Judgment (Doc. No. 201, filed July 17, 1989), Memorandum of Law attached thereto, and Plaintiff's Response to Defendant Lamar's Supplemental Motion for Summary Judgment (doc. No. 208, filed July 27, 1989).

3. Defendant Simpson's Motion for Extension of Time to file Pre-Trial Compliance (doc. No. 179, filed May 26, 1989), and Plaintiff's Motion for Extension of Time to File Unilateral Pretrail Catalogue (doc. No. 186, filed June 21, 1989). These Motions are GRANTED. The remaining parties are hereby ORDERED to file their pretrial stipulation no later than august 8, 1989, at 9:00 a.m. Failure to comply with this order may result in dismissal of this

action.

4. Plaintiff's Motion to accept late filing of memorandum in opposition to Defendant Minnie Bridges' Motion for Summary Judgment (doc. No. 187, filed June 21, 1989), and Defendant Minnie Bridges' Objection to Plaintiff's Motion to Accept Late Filing of her Memorandum of Law in Opposition to Defendant Minnie Bridges' Motion for Summary Judgment (doc. No. 193, filed June 30, 1989). This Motion is moot as a result of the Court's order of July 10, 1989, and it is therefore DENIED. The objection is also moot.

In his Supplemental Motion Defendant Simpson addresses Plaintiff's allegation in Count IX of her third amended complaint that he placed an electronic eavesdropping device on Plaintiff's telephone thereby violating 18 U.S.C.

Section 2520. Defendant Simpson denies this allegation in his affidavit and asserts that even if he did wiretap the telephone in Plaintiff's house, it was not a violation of 18 U.S.C. Section 2520 because this statute does not apply to events that occur in the marital estate and the alleged wiretapping took place in the marital estate by virtue of the fact that it occurred prior to the dissolution of his marriage to plaintiff. Plaintiff responds that the eavesdropping occurred after the marriage was dissolved and submits the affidavit of Mary Cathering McCarkle Pruit to support her allegations that there was an electronic eavesdropping device on her telephone and that Defendant Simpson was responsible for it. As a result of this conflicting evidence, it appears that there is a genuine question of material fact and

Defendant Simpson's Supplemental Motion (Doc. No. 197) is DENIED.

DEFENDANT LAMAR'S MOTION

In his supplement to his motion for summary judgment, defendant Lamar seeks summary judgment on Counts, IV and V of Plaintiff's third amended complaint which allege that a deputy sheriff used excessive force during Plaintiff's arrest. This court has previously determined (see Doc. No. 194, filed on July 10, 1989, at 14) that in order to state a cause of action against Defendant Lamar for the actions of a deputy sheriff Plaintiff is required to demonstrate that the constitutional deprivation was the result of a governmental custom, policy, ordinance, regulation or decision officially adopted and promulgated by the officers. See, e.g., Monell v. New York City Dep't of Social Services, 436 U.S.

658, 690-92 (1978); Brown v. city of Cleviston, 848 F.2d 1534, 1537 (11th Cir. 1988); Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986).

Defendant Lamar asserts that summary judgment is warranted because the affidavit submitted in support of his supplement to his Motion for summary judgment indicate that the

deputy sheriff who arrested Plaintiff during the forcible entry of Plaintiff's home did not use excessive force and that any alleged use of excessive force during the arrest was not pursuant to a custom, policy, ordinanace or decision adopted and promulgated by the office of the Sheriff. In response to Defendant Lamar's Supplement, Plaintiff has filed an affidavit of a person who was present during the arrest, Mary Catherine McCarkle Pruitt, which describes the deputy sheriff's excessive use of force. Plaintiff assert that as a result of this affidavit there is conflictiong evidence concerning the deputy sheriff's behavior which creates a genuine issue of material fact sufficient to withstand Defendant Lamar's Motion for Summary Judgment. Plaintiff, however,

"concedes that she has no evidence that [the deputy sheriff's alleged use of excessive force] resulted from a policy of the Sheriff of Orange County...."

Plaintiff's Response to Defendant, Lawson Lamar's Supplemental Motion for Summary Judgment (Doc. No. 208, filed July 27, 1989), at 2.

The United States Supreme Court has determined that summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). the Court has further explained that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise

properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986)(emphasis in original). Therefore, the fact that there may be a dispute over whether excessive force was used is not sufficient to withstand a motion for summary judgment when there is no evidence to establish the existence to her case, i.e., that the alleged excessive use of force was the result of an official policy, statute, ordinance, regulation, custom, or usage. See Brown v. City of Clewiston, 848 F.sd 1534, 1537 (11th Cir. 1988). therefore, Defendant Lamar's Supplemental Motion for Summary Judgment is hereby GRANTED. The allegations in Counts IV and Vof Plaintiff's Third Amended Complaint

concerning Defendant Lamar's liabilty for a deputy sheriff's use of excessive force during the arrest of Plaintiff are DISMISSED with prejudice.

DONE AND ORDERED in Chambers at Orlando, Florida, this 4th day of August, 1989.

/S/ PATRICIA C. FAWSETT
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record
in 85-455-CIV-ORL-19

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO: 85-455-Civ-Orl-19

ELEANOR S. SIMPSON,
PLAINTIFF,

-v-

DONALD M. SIMPSON, TERRY C. YOUNG,
GILES, HEDRICK & ROBINSON, P.A.
TANYA PLAUT, MINNIE BRIDGES &
LAWSON LAMAR, SHERIFF, ORANGE CO. FLA.
DEFENDANTS /

NOTICE OF APPEAL OF A
FINAL JUDGEMENT

Comes Now Eleanor S. Simpson in Proper Person and timely files this her Notice of Appeal of the Court Order dated July 10, 1989 and Order dated Aug. 7, 1989 #211 (Docket-Fed.) by the Honorable Patricia Fawsett of the Middle District of Florida, Orlando Div.

Order:

Defendant Lamar's Supplemental Motion for Summary Judgement (Docu #201) is Granted.

> The allegations of Counts 4 & 5 of Plaintiff's 3rd Amended Complaint concerning Lamar's liability for a deputy sheriff's use of excessive force during the arrest of Plaintiff are DISMISSED WITH PREJUDICE. s/Judge Fawsett 8-08-89 eod 08-07-89

Plaintiff has again been denied the right to a Trial by Jury in Federal Court where the deprivation of real & personal property was taken from the Plaintiff as a result of unconstitutional official policy of Sheriff Lawson Lamars Sheriff's Dept. of Orange County, Florida without Due Process of Law and without the Right of Redemption. Conspiracy with State Judges & Attorneys "under color of State

Law" was to be made factual evidence with all the Discovery Depositions & Exhibits taken for the past four years at the time of the Trial by Jury. 42 U.S.C. 1983 & 42 U.S.C. 1985.

All parties on the attached sheet are called upon to take Notice. I hereby certify that a copy of the foregoing has been furnished this date by mail delivery to the attached sheet.

I further certify that this Notice Of Appeal is being hand delivered to the United States Federal Court-Middle District on the 31st day of August, 1989

I certify the foregoing to be a true and correct copy of the original.
DONALD M. CINNAMOND, Clerk
United States District Court
Middle District of Florida
By: /S/ Deputy Clerk

/S/ Eleanor Simpson
Eleanor S. Simpson, Pro Se
10751 William Tell Dr.
Orlando, FL 32821
Telephone #407-351-2018

EXCERPTS FROM THE

REPORT OF

THE FLORIDA SUPREME COURT

GENDER BIAS STUDY COMMISSION

1990

EXECUTIVE SUMMARY

REPORT OF

THE FLORIDA SUPREME COURT

GENDER BIAS STUDY COMMISSION

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I. INTRODUCTION

The Commission found during its two years of hearings and study that gender bias--discrimination based solely on one's sex--is a reality for far too many people involved in the legal system. And invariably, those who regard gender bias as an illusion have never suffered its affects. Indeed, the overwhelming weigh of evidence and research gathered by the Commission supports only one possible conclusion: Although some may ignore its existence, gender bias permeates Florida's legal system today. Certainly the Commission is aware that the practice of law often only reflects our society's larger culture. Gender bias surely did not originate with lawyers alone. Nevertheless, gender bias is practiced to a disturbing degree by members of this state's legal profession, often in forms that have

become highly institutionalized. The refusal of some lawyers to acknowledge this fact is one of the primary mechanisms by which gender bias is perpetuated.

From its inception, the Commission's charge was to document the true scope of this problem and propose solutions. We were not asked simply to determine if gender bias exists in Florida, because this question already had been resolved by a detailed monograph published by Charlene Carres and the Florida State University Policy Studies Clinic. After reviewing this monograph, the Chief Justice of Florida and his colleagues on the Florida Supreme Court concluded that gender does infact exist in the state's legal system. The Court then created the Commission and ordered it "to determine in what areas of our legal

society bias based on gender exists, and recommend measures to correct, or at least minimize the effect of, any such bias."

This Report fulfills the Commission's mandate. The findings and recommedations made by the Commission are based upon public hearings, regional meetings, case studies, scholarly research and a variety of empirical studies.

The Commission undertook a multidisciplinary approach to the investigation and preparation of its Report. It held public hearings and regional meetings around the State, receiving testimony and reports from legislators, professionals in a wide array of fields, and all others who wished to speak on the subject of gender bias. Regional meetings were informal

discussions primarily with women lawyers and other interested residents of communities around the State.

In addition to the hearings, the Commission undertook extensive research. Our studies included five major surveys of member of The Florida Bar, Florida judges, members of the Florida Association for Women Lawyers, and students in Florida law schools. Among the topics addressed by these surveys were judicial attitudes, equitable distribution and disparate treatment. Other supplemental studies examined adult arrest and sentencing patterns, the juvenile justice system, prostitution, and the treatment of male and female court personnel, including assistant state attorneys and assistant public defenders. We also conducted a preliminary study on facitlities and

programs for men and women incarcerated in Florida's jails.

The Commission heard detailed presentations on child support enforcement by the National Conference of State Legislators and on domestic violence by the Dade County Domestic Violence Program. We conducted an analysis of all reported family law decisions from January through June 1989 and completed a review of published and unpublished scholarly works in all areas of the law relevant to this Report.

The full Commission discussed each finding and recommendation before its adoption. Not every Commissioner agreed with every finding and recommendation. Nevertheless, the Report in its totality represents the consensus of the entire Commission.

This Executive Summary reproduces these findings and recommendations and summarizes the discussion that accompany them. The topics covered here are gender bias in the dissolution of marriage, custody and child support; gender bias in criminal justice; and gender bias in the legal profession.

The section on "Gender Bias in Criminal Justice" addresses Domestic violence, sexual battery, crime and incarceration, prostitution and juvenile justice.

Finally, the section on "Gender Bias in the Legal Profession" addresses the courthouse enviroment, professional opportunities, the law firm enviroment, legal education and gender bias in usage of language.

II. GENDER BIAS IN THE DISSOLUTION OF MARRIAGE, CUSTODY AND CHILD SUPPORT

Women and children experience life after divorce far differently than men. While all family members suffer the trauma of divorce, only the women and children's pain is compounded by being diprived of their economic well-being. This is the harsh reality of most divorce in Florida today. Although Florida's "no-fault" divorce statute is written in gender-neutral language, the Commission found that judicial decisions based upon this language are gender-discriminatory in application. The reason largely is an unrealistic assumption by judges that men an women are economic equals in present society.

The Commission also determined that men customarily retain more than half of

the assets of the marriage and leave with an enhanced earning capacity. The remaining family members, however, are left with less than half of the marital assets and a severely diminished and declining earning capacity.

The Commission has concluded that Florida's judiciary minimizes the time, energy, and lost opportunities involved in being a homemaker and primary caretaker of children. Judges generally are reluctant to acknowledge that these contributions are a genuine partnership asset of the marriage.

Moreover, the Commission found that Florida's judiciary denies women the economic resources to retain competent legal representation. As a result, women are critically disadvataged in enforcing their legal right alimony, equitable distribution of marital assets, and child support.

Findings

a. Economics of Divorce

1. Men customarily retain more than half of the assets of the marriage and leave with anenhanced earning capacity. The remaning family members are left with less than half of the marital assets and a severely dimished and declining earning capacity.
2. A homemaker's contributions of time and energy, as well as the opportunities she has forgone, often are minimized by Florida's courts. Many judges are especially reluctant to acknowledge that these contributions are a genuine resource of a marriage.
3. Post-divorce families headed by women are the fastest growing segment of those living in poverty.

4. Older women whose marriages end in divorce are most likely either to have abondoned their own aspirations or to have devoted their lives to furthering their husbands careers. They are not adequately compensated by application of the present system of alimony and equitable distribution of marital assets.

b. Access to Justice

1. Women who lack means are routinely denied their statutory right retain competent legal representation. Without competent counsel, women are critically disadvataged in enforcing their right to alimony, equitable distribution of marital assets and child support.

2. Many lawyers will not represent woman in divorce cases because women generally have fewer economic

resources and therefore cannot afford the fees.

3. Florida's public legal aid system is not a realistic alternative to private representation. There are not enoug legal aid attorneys, nor are there any plans to increase the number to meet the need.

4. Current statutes require a judge to order the more financially secure spouse to pay the other spouse's ongoing legal fees and support if the request is well founded. However, these laws generally are not observed or are observed in a manner biased against women.

5. Many judges fail to require the more financially secure spouse to pay the other spouse's fees and costs because of a false perception that attorneys can or are willing to

"finance" divorce actions for their clients.

6. An award of attorney's fees, if it occurs at all, usually comes at the close of the case. Often the award is reduced by the judge, especially if a woman attorney represented a woman litigant.

c. Judicial Attitudes

1. Most of Florida's circuit court judges dislike dealing with family law matters. This attitude can affect the outcome of cases.

2. Many judges in Florida presume that a woman will enter the job market after divorce regardless of the length or conditions of the marriage and notwithstanding her age, lack of training or justifiable expectations.

3. Many Florida judges fail to appreciate or recognize the difficulties for women in starting a career at an age when many men are close to retirement.

d. Appellate Review

As a consequence of limited finances, many women are virtually forclosed from appellate review of trial court decisions. Frequently they cannot afford the trial transcript or appellate counsel necessary for an appeal.

e. Equitable Distribution and Spousal Support

1. Fault plays a definite role in some marital dissolutions, despite the characterization of Florida's divorce law as being "no-fault." The statute's alimony section provides that the adultery of either spouse may be considered when

determining the amount of the alimony, if any. Because women historically are the ones who must seek alimony, however, they have been disproportionately affected by findings of fault.

2. In many areas of the state, the courts have virtually abandoned permanent alimony or substituted in its place unrealistic rehabilitative alimony awards.

3. Many judges fail to ward permanent alimony, prefering instead to use the vehicle of equitable distribution. Yet, because men usually have a greater earning potential, women are disadvataged by "equitable" distribution when martial assest are too slight to provide a sufficient income.

4. In equitable distributions, men generally receive sixty-five to seventy-five percent of the marital assests compared to twenty-five to thiry-five percent for women.

5. The new equitable distribution statute has an extensive list of factors to be considered in distributing assets, but it lacks a requirement of written findings of fact. This allows a trial court almost unreviewable discretion in dividing marital property.

6. The major asset of most marriages is the earning capacities of the partners.

7. Before the no-fault divorce and equitable distribution statutes were adopted, courts usually allowed the custodial parent and children to occupy the family home after

divorce, in addition to receiving support. Common practice today, however, is to order sale of the family home so that a cash settlement can be made for equitable distribution pruposes.

8. As a result of their almost unlimited discretion, trial courts distribute marital assets either as property or alimony with a lack of certainty and consistency. This may lead to inappropriate property settlements between the parties.

Recommemdations

a. Equitable Distribution and Spousal Support

1. The legislature should adopt the concept of community property be providing that marital assets enumerated in the equitable

distribution statute be considered joint marital assets.

2. There should be a presumption that all marital assets be divided evenly.

3. Even if it rejects the concept of community property, the legislature should amend the dissolution statute to require that equitable distribution awards have explicit findings of fact tht include the valuation of assets. Also, the certainty and consistency previously lacking in Florida appellate decisions should be encouraged by a presumption in favor of equal division and a statutory requirement that unequal division be supported by factual findings based on enumerated factors. Without such a requirement, the disparities of the

past will continue. A presumption of equal division and the husband's incentive to gain an advantage through continued litigation and would improve the ability of the appellate courts to review cases....

5. Spousal support awards for marriages of long duration should be designed to equalize the standards of living of post-divorce households at the time of dissolution. The current standard seeks only to maintain the standard of living established during the marriage. A rebuttable presumption in favor of permanent periodic alimony in long-term marriages is appropriate.

6. The legislature should amend the dissolution of marriage statute to require that:

a. Each equitable distribution judgment should contain findings of fact, including determination of values of the assets and the reasons for the award; or

b. In the alternative, if a trial judge does not divide property evenly, the judgment should contain findings of fact justifying the result.

7. If a judge awards periodic alimony for equitable distribution purposes, the award should not terminate on remarriage or death. The party wishing to terminate spousal support than would be required to file a modification petition, and written findings should be required.....

d. Judiciary

The Florida Conference of Circuit Judges should establish an annual comprehensive

judicial training and education program in family law that includes the economic consequences of dissolution and ways in which judicial decisions disproportionately effect each gender. Attendance should be mandatory for all judges hearing family law matters.

e. Access to Justice

Judges must eliminate the egregious imequity caused by their failure to award a disadvantaged spouse temporary and final fees and costs provided by law.

f. Prenuptial Agreements

Because of the failure of equitable distribution, some couples enter into prenuptial agreements requiring an even split of assets upon dissolution. Unfortunately, the majority of persons remain unaware of their legal rights upon entering a marriage. Thus, when a

couple applies for a marriage license, they should receive a pamphlet outling current Florida case law and legislation regarding marital rights, dissolution, custody, child support and enforcement.

g. Family Court or Family Divisions

Where feasible, the chief judge of each circuit with more than five circuit judges sitting in a single county should create a family law division.

h. Mediation

1. The Commission recommends mandatory mediation for disputes about parental responsibility, except when domestic violence is reported to exist in the family. The primary focus of mediationwould be to require parents to formulate a parenting plan. This would divert parents from fighting over possessory labels, such as custody,

by focusing instead on formulating a practical plan for raising the children.

2. Mediation services should require divorcing parents to attend classes on the impact of divorce trauma on their children, as well as the problems they are going to encounter as they divorce and what is expected of them. Noncompliance would be a factor for the court to consider in approving a parenting plan and subsequent visitation.

THE PRESSING NEED TO ELIMINATE GENDER BIAS in Florida's Justice System

by Justice Gerald Kogan

"Gender bias"-irrational discrimination based on a person's sex-is an unfortunate aspect of nearly every Florida legal institution. This is the reality disclosed in two years of study by the Florida Supreme Court Gender Bias Study Commission, whose final report is summarized on the pages that follow.

In fact, gender bias threatens to undermine this state's policy of providing equal protection for all its citizens. Gender bias belies the Florida Constitution's guarantee that all persons "are equal before the law and have inalienable rights, among which are the right ... to be rewarded for industry." Too often in Florida

equality before the bar and bench and the right to be rewarded for industrious advocacy depend heavily on one's gender.

The final report constitutes the most thorough documentation of this problem over undertaken in Florida. Our analysis and recommendations are based on thousands of hours of work and research by commissioners, legal scholors, practicing attorneys, legal assistants, and hundreds of individuals who testified before commission hearings held throughout the state. Every aspect of Florida's justice system was investigated, in keeping with the charter issued to this commission by Chief Justice Parker Lee McDonald on June 7, 1987.

The findings of the commission amply illustrate the pressing need to rid our profession and our professional

lives of gender bias. In an effort to achieve this goal, the commission also has provided an extensive series of recommendations. These include proposed reforms by the Florida Supreme Court, the legislature, The Florida Bar, other professional organizations, and the state's law schools. Although some commissioners dissented from particular findings or recommendations, the oeverall report was approved by the consensus.

By publishing the condensed report in the Florida Bar Journal, the commission hopes to inform every Bar member of both our findings and recommendations. We publish these materials with the hope of disclosing a serious problem in our justice system that, in fairness to ourselves and out

of respect for our constitution, we must make every effort to eliminate.

A member of the Supreme Court since 1987. Justice Kogan chaired the Supreme Court Gender Bias Study Commission.

The Florida Bar Journal/May 1990

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 89-3673 & 89-3804

D.C. Docket No. 85-00455-CIV-ORL-19

ELEANOR S. SIMPSON,

Plaintiff-Appellant,

versus

DONALD M. SIMPSON, TERRY C. YOUNG, TANYA PLAUT, GILES, HEDRICK & ROBINSON, P.A., MINNIE BRIDGES, and LAWSON LAMAR, as Sheriff, Orange County, Florida,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

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(November 15, 1990)

Before KRAVTCH and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir.R. 36-1.

*Honorable C. Clyde Atkins, Senior U.S. District Judgefor the Southern Districtof Florida, sitting by designation.